

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Dennis Walsh,

Complainant,

vs.

**ORDER ON
PROBABLE CAUSE**

Jay Nygard and Gabriel Jabbour,

Respondents.

This matter came before Administrative Law Judge Jeffery Oxley for a probable cause hearing on October 13, 2016.

Cassandra Merrick, Robins Kaplan LLP, appeared on behalf of Dennis Walsh (Complainant). Kimberly Fleming and Robyn Johnson, Cousineau McGuire Chartered, appeared on behalf of Gabriel Jabbour (Respondent). Erick Kaardal, Mohrman, Kaardal & Erickson, P.A., appeared on behalf of Jay Nygard (Respondent).

This matter was convened to consider a complaint filed under the Fair Campaign Practices Act (Complaint) by Complainant on October 6, 2016. The probable cause hearing was conducted by telephone conference call.


Based upon the Complaint, the filings, the record created at the probable cause hearing, and for the reasons set forth in the attached Memorandum incorporated herein, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. There is sufficient probable cause to believe the Respondents violated Minn. Stat. § 211B.04 (2016), as alleged in the Complaint.
2. This matter is referred to the Chief Administrative Law Judge for assignment to a panel of three Administrative Law Judges for an evidentiary hearing, pursuant to Minn. Stat. § 211B.35 (2016).

Dated: October 18, 2016


JEFFERY OXLEY
Administrative Law Judge

MEMORANDUM

Factual and Procedural Background

The Complainant, Dennis Walsh, is a member of the Orono City Council and is running for Mayor of Orono in the November 2016 general election. The Respondents, Gabriel Jabbour and Jay Nygard, are Orono residents.

The Complaint alleges that the Respondents violated Minn. Stat. §§ 211B.04 and 211B.06 (2016) by participating in the preparation and dissemination of false and misleading campaign material that lacked a disclaimer.

The Complainant submitted copies of the campaign material at issue. The first document¹ is a flyer that is critical of the Complainant and directs readers to visit: www.CitizenForOrono.com. The flyer includes a disclaimer that states: “Disclaimer: This communication is an independent expenditure and is not approved by any candidate nor is any candidate responsible for it.”

The second document² is a flyer that states that “Candidate Dennis Walsh” was charged with a DUI and has “spent thousands of dollars in litigation battling his own legal disputes at tax payers’ expense.” This document also directs readers to visit www.CitizenForOrono.com and appears to contain the same disclaimer language although some of the disclaimer cannot be seen in the copy.

The third document³ is a screen shot of a Facebook page titled “Citizen for Orono” that features materials critical of the Complainant and identifies him as “Candidate Walsh.” Some of the posts on the page are critical of Walsh’s candidacy. Versions of the flyers described above appear on the page.

Document 4 is a screen shot of the www.CitizenForOrono.com web page. The Administrative Law Judge visited the web page. The web page contains a copyright notice: “Copyright © Citizen For Orono.” One of the documents featured on the web page includes a disclaimer that states: “[t]his communication is an independent expenditure and is not approved by any candidate nor is any candidate responsible for it.”

The materials meet the definition of “campaign material” and are, therefore, required to include a disclaimer “substantially in the form” provided in Minn. Stat. § 211B.04(b) unless the materials meet one of the exceptions provided at Minn. Stat. § 211B.04(c)-(f).

By Order dated October 10, 2016, the Administrative Law Judge dismissed the section 211B.06 claims, but determined that the Complaint did set forth sufficient facts to

¹ Exhibit (Ex.) 1.

² Ex. 2.

³ Ex. 3.

allege prima facie violations of section 211B.04 and scheduled the matter for a probable cause hearing.⁴

Legal Standard

The purpose of a probable cause hearing is to determine whether there are sufficient facts to believe that a violation of law has occurred as alleged in the Complaint.⁵ The Administrative Law Judge must decide whether, given the facts in the record, it is fair and reasonable to require the respondent to go to hearing on the merits.⁶ If the Judge is satisfied that the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict in a like civil case, a motion to dismiss a campaign violation complaint for lack of probable cause should be denied.⁷

A judge's function at a probable cause hearing does not extend to an assessment of the relative credibility of conflicting testimony; the task is simply to determine whether the facts available establish a reasonable belief that the Respondents have committed a violation. At a hearing on the merits, a panel has the benefit of a more fully developed record and the ability to make credibility determinations in evaluating whether a violation has been proved, considering the record as a whole and the applicable evidentiary burdens and standards.⁸

Analysis

I. Constitutional Challenge

Prior to the probable cause hearing, Respondent Nygard moved to dismiss this matter on the grounds that the disclaimer requirement is unconstitutional. Nygard asserts that the Minnesota Court of Appeals, in *Riley v. Jankowski*,⁹ determined that Minn. Stat. § 211B.04 unconstitutionally restricts pure speech in violation of the First Amendment. Based on the holding in *Riley*, Nygard argues that this matter rests on an unconstitutional statute and must be dismissed.

⁴ See *Walsh v. Nygard and Jabbour*, OAH Docket 19-0325-33877, NOTICE OF DETERMINATION OF PRIMA FACIE VIOLATION AND NOTICE OF AND ORDER FOR PROBABLE CAUSE HEARING (Oct. 10, 2016).

⁵ See *Weinberger v. Maplewood Review*, 668 N.W.2d 667, 674 (Minn. 2003) (“[I]n civil cases probable cause constitutes a *bona fide* belief in the existence of the facts essential under the law for the action, and such as would warrant a person of ordinary caution, prudence and judgment, under the circumstances, in entertaining it”) (quoting *New England Land Co. v. DeMarkey*, 569 A.2d 1098, 1103 (Conn. 1990) (internal punctuation omitted).); see also *State v. Florence*, 239 N.W.2d 892, 902 (Minn. 1976) (explaining operation of probable cause standard in criminal context).

⁶ See *Hortman v. Republican Party of Minn.*, OAH Docket No. 15-0320-17530, PROBABLE CAUSE ORDER at 3 (Oct. 2, 2006).

⁷ In civil cases, a motion for a directed verdict presents a question of law regarding the sufficiency of the evidence to raise a fact question. The judge must view all the evidence presented in the light most favorable to the adverse party and resolve all issues of credibility in the adverse party's favor. See, e.g., Minn. R. Civ. P. 50.01; *Midland National Bank v. Perranoski*, 299 N.W.2d 404, 409 (Minn. 1980); *LeBeau v. Buchanan*, 236 N.W.2d 789, 791 (Minn. 1975).

⁸ Compare, e.g., *State v. Florence*, 239 N.W.2d 903, n. 24 (Minn. 1976).

⁹ 713 N.W. 2d 379, 401, (Minn. Ct. App. 2006), review denied (Minn. July 20, 2006).

Although the disclosure requirements in section 211B.04 were found to be unconstitutional by the Minnesota Court of Appeals in *Riley v. Jankowski*,¹⁰ the U.S. Supreme Court subsequently rejected both facial and as-applied challenges to similar federal disclaimer requirements in *Citizens United v. FEC*.¹¹ The Court held that such disclaimer provisions place no significant burden on First Amendment rights and help citizens make informed choices in the political marketplace.¹² Following that decision, the Minnesota Legislature amended Minn. Stat. § 211B.04 effective June 1, 2010, to apply to all campaign material prepared and disseminated on or after that date.¹³ In 2015, the Legislature amended the statute again, including the exemption for independent expenditures, which is the provision at issue in this matter.¹⁴ Given this legislative history, the Administrative Law Judge concludes the statute is enforceable. Moreover, neither an administrative law judge nor an administrative agency has authority to declare a statute unconstitutional on its face.¹⁵ Therefore, Respondent Nygard may preserve this argument for appeal, if necessary.

II. Probable Cause Determination

At the probable cause hearing, the parties provided contradictory testimony regarding the creation of the campaign materials. The Complainant testified under oath that he heard from three different people that Jabbour had told them that Nygard was the owner of the website. The Complainant also testified that he overheard a telephone conversation between Jabbour and a woman named Ashley England wherein Jabbour stated that he had nothing to do with the website or flyers other than providing some limited information for them. According to the Complainant, Jabbour indicated to Ms. England that five other women had inquired as to his involvement with the material and he insisted he had nothing to do with creating the website but that he did give some information to it. Finally, the Complainant testified that, when he was with Ms. England, she telephoned a friend who works at GoDaddy, the web domain registration site, and this friend identified Nygard as the owner of the website www.CitizenForOrono.com.

In contrast to the Complainant's testimony, both Jabbour and Nygard adamantly insisted that Jabbour alone created the website and other campaign materials. Jabbour stated that he spent approximately \$15,000 in preparing and disseminating the website and flyers at issue. Jabbour further testified that Ashley England texted him during the probable cause hearing and, according to Jabbour, Ms. England indicated that the

¹⁰ *Id.*

¹¹ 558 U.S. 50 (21010).

¹² *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 196 (2003) (precluding facial challenges); *Citizens United v. Federal Election Comm'n*, 558 U.S. at 367-368 (2010) (rejecting an as-applied challenge). See also *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) (holding an Ohio statute, as applied to the petitioner, conflicted with the First Amendment right to speak anonymously).

¹³ See 2010 Minnesota Session Laws Ch. 397, § 15.

¹⁴ See 2015 Minnesota Session Laws Ch. 73, § 22 (amending former Minn. Stat. § 211B.04(f) (2014)).

¹⁵ G. Beck, *Minnesota Administrative Procedure* § 11.5 (2d ed. 1998). See, e.g., *Neeland v. Clearwater Memorial Hospital*, 257 N.W.2d 366, 368 (Minn. 1977); *Petterssen v. Commissioner of Employment Serv.*, 306 Minn. 542, 543, 236 N.W.2d 168, 169 (Minn. 1975); *Starkweather v. Blair*, 245 Minn. 371, 394-95, 71 N.W.2d 869, 884 (1955); *In the Matter of Rochester Ambulance Service*, 500 N.W.2d 495 (Minn. Ct. App. 1993).

Complainant could not have overheard her telephone conversation with Jabbour as claimed.

Minnesota Statutes, section 211B.04 requires a person who participates in the preparation or dissemination of “campaign material” to include the name and address of the person or committee causing the material to be prepared or disseminated.¹⁶ The disclaimer is required to provide the name and address of the candidate’s committee that prepared and paid for the signs and must read substantially as follows: “Prepared and paid for by the _____ committee _____ (address).”¹⁷ Campaign material is defined in relevant part as any material disseminated for the purpose of influencing voting.¹⁸

Minnesota Statutes, section 211B.04(e) provides an exemption to the disclaimer requirement for individuals who are not required to register or report under chapter 211A (2016). Chapter 211A governs the campaign financial reporting requirements for those seeking election to county, municipal, and other local offices.

Pursuant to Minn. Stat. 211A.02, only candidates or “committees” that receive or make disbursements of more than \$750 in a calendar year are required to report. For purposes of this statute, “committee” is defined, in relevant part, as “a corporation association or persons acting together to influence the nomination, election, or defeat of a candidate.” Based on this definition, an individual who is not a candidate and who acts alone to promote or defeat a candidate is not a “committee,” and, therefore, not required to file campaign finance reports under chapter 211A. Such an individual is also not required to include a disclaimer on campaign material, under section 211B.04(e).

Therefore, if the Respondents acted together in preparing or disseminating the campaign material at issue, they would be considered a “committee” and would be required to file a campaign finance report under section 211A.02 because they spent more than \$750. They would also be required to include a disclaimer substantially in the form required under section 211B.04. If Jabbour acted alone in preparing and disseminating the campaign material, as he maintains, he would meet the exemption to the disclaimer requirement provided at section 211B.04(e).

After reviewing the record and considering the testimony presented during the probable cause hearing, the Administrative Law concludes that the Complainant has presented sufficient evidence to support finding probable cause to believe the Respondents jointly participated in the preparation or dissemination of the material at issue and failed to include a disclaimer in the form required in violation of Minn. Stat. § 211B.04.

As noted above, at this stage of the proceeding, the Administrative Law Judge lacks the authority to make credibility determinations. Consequently, he cannot reject Walsh’s testimony of what he claims he overheard Jabbour tell England in favor of Jabbour’s strenuous denial of the same. Nor can the Administrative Law Judge accept

¹⁶ Minn. Stat. § 211B.04(b).

¹⁷ *Id.*

¹⁸ Minn. Stat. § 211B.01, subd. 2 (2016).

Nygaard's likewise vigorous assertion of non-involvement over Walsh's testimony concerning Jabbour's admission to Ms. England.

This matter will be referred to the Chief Judge for assignment of a panel and will proceed to a hearing on the merits.¹⁹ The burden will be on the Complaint at the evidentiary hearing to prove the alleged violation by a preponderance of the evidence.²⁰

J. O.

¹⁹ See *Hortman v. Republican Party of Minn.*, OAH Docket No. 15-0320-17530, PROBABLE CAUSE ORDER at 3 (Oct. 2, 2006).

²⁰ Minn. Stat. § 211B.32, subd. 4 (2016).